Filed 1/28/02

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **MARK CHARLES DAIGRE,** **Defendant and Appellant.**	**A093472** **(Napa County Super. Ct. No. CR101927)**

Following a court trial, Mark Charles Daigre was convicted of 19 counts of sex- and kidnapping-related offenses and sentenced to prison for an indeterminate term of 240 years to life, plus a determinate term of seven years. Defendant appeals his judgment of conviction and sentence on several grounds. First, in reliance on *People v. Jones* (2001) 25 Cal.4th 98, he argues that the trial court improperly imposed eight consecutive terms of 25 years to life under Penal Code[1] section 667.61. The People agree on this point and join in defendant's request to remand the case for resentencing. Second, defendant challenges his conviction of three counts of sodomy by force (§ 286, subd. (c)) and two counts of forcible oral copulation (§ 288a, subd. (c)), asserting that those convictions should have been dismissed as lesser-included offenses to yet other convictions for aggravated sexual assault (sodomy) of a child (§ 269, subd. (a)(3)) and aggravated sexual assault (oral copulation) of a child (§ 269, subd. (a)(4)) arising from identical acts by him. We agree with this contention. Finally, defendant argues that he was improperly

[1] All undesignated section references are to the Penal Code.

convicted of multiple counts of kidnapping-related offenses when the facts established that there had been only one continuous detention of the victim. We disagree with this contention, and affirm this aspect of the judgment.

BACKGROUND

The facts presented at trial are not in dispute. By stipulation of the parties, the facts were presented to the court through a videotaped statement that the 13-year-old male victim (the victim) made to the police.

On December 30, 1999, at approximately 10:00 a.m., the victim and his brother went to a Target department store. Later, the victim's brother had to go to work, and he told the victim to take a bus home. While the victim was waiting at the bus stop, defendant drove by. Defendant was a friend of the family and had known the victim for several years. Defendant offered the victim a ride home, and the victim accepted.

On the ride home, defendant told the victim that he had to stop at defendant's home and drop off some plants. When they arrived at defendant's house, defendant invited the victim inside and offered him orange juice. After approximately five minutes, the victim told defendant that he needed to return home. Defendant grabbed the victim, put him in a headlock, and covered the victim's nose and mouth with his hand. At first the victim thought defendant was playing around and told him to stop. Defendant dragged the victim into the bathroom. The victim resisted but defendant overpowered him. The victim defecated in his pants and lost consciousness from being choked by defendant.

When the victim regained consciousness, he was upstairs in a bedroom, lying on the floor on his stomach, and defendant was wiping his anus. Defendant blindfolded and gagged the victim and tied his arms behind his back. Defendant removed the remainder of the victim's clothing, using a knife to cut and remove the victim's shirt, and then placed the victim on the bed. The victim then heard defendant remove his own clothing.

Defendant sat next to the victim on the bed and fondled the victim's penis. Defendant then sodomized the victim. Defendant penetrated the victim several times, rested, and penetrated him again. Defendant kissed the victim and orally copulated him.

Defendant then removed the victim's blindfold and told the victim to suck his penis. When the victim refused, defendant threatened to hurt him. The victim complied. During the oral copulation, the victim became dizzy and vomited.

Defendant sodomized the victim again. The victim protested that he had to use the bathroom. Defendant took the victim to the bathroom. The victim's anus was bleeding. The victim went back to the bedroom and lay down on the bed. Defendant resumed his acts of sodomy. The victim could not recall exactly how many times defendant sodomized him, but said that it was at least three times. The victim estimated that the assault lasted one to two hours. The victim was scared and in pain. During the assault, defendant told the victim that he had wanted to do this since the day he met the victim. The victim protested that he was hungry. Defendant took the victim to the kitchen and gave him a bagel. The victim asked defendant if defendant was going to hurt him. Defendant replied "Not more than I already have." The victim asked defendant when he was going to be done. Defendant replied, "When I'm finished." The victim asked when that would be, and defendant responded that he did not know.

At approximately 3:00 p.m., defendant washed the victim's clothes. While they were waiting, defendant kept saying "I'm sorry" and "there is something broken inside of me." Defendant offered the victim a ride home. The victim insisted that he would walk. Defendant let the victim go. The victim walked home and told two family members about the assault.

Later the same day, registered nurse Lisa Lewis-Javar conducted a sexual assault examination of the victim. His eyes showed signs of bleeding, consistent with having been strangled. The victim also had facial contusions. He reported blurred vision in one eye. The other aspects of his medical examination were consistent with having suffered the sexual assaults that the victim recounted to the police.

Following his arrest, defendant gave a videotaped statement to the police. When the police asked defendant to give his version of events, defendant replied, "I'm going to prison. I don't think [the victim] exaggerated or lied in any way, shape or form. . . . I don't know what he said, um, but I hurt that boy really, really, really bad."

Defendant also told police that he saw the victim at a 7-Eleven store. Defendant had known the victim for a number of years and offered him a ride home. Defendant took the victim to defendant's house instead. Defendant admitted choking the victim to the point of unconsciousness, undressing him, tying and gagging him. Defendant spanked, fondled and orally copulated the victim. Defendant forced the victim to orally copulate him. Defendant then sodomized the victim three or four times and ejaculated three or four times. Defendant estimated that the entire incident lasted approximately one and one-half to two hours. Defendant confirmed that the victim urinated and defecated while defendant was choking him. Defendant admitted cutting off the victim's shirt, and said that he did it so that he could remove the shirt without untying him. The victim cried during the assault and asked defendant to stop. Defendant claimed that he did not intend to kidnap and assault the victim when defendant first picked him up. Defendant had "no idea" what was going through his mind when he assaulted the victim. He stated that something was broken inside his head.

On August 7, 2000, the District Attorney of Napa County filed an information charging defendant as follows: in count 1, with assault by means likely to produce great bodily injury (§ 245, subd. (a)(l)), with an allegation that defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)); in counts 2, 3, 4 and 5, with sodomy by force (§ 286, subd. (c)), with allegations that defendant kidnapped the victim, personally inflicted great bodily injury on the victim, and engaged in the tying or binding of the victim, within the meaning of sections 667.61 and 12022.8; in counts 6, 7, 8 and 9, with aggravated sexual assault (sodomy) of a child (§ 269, subd. (a)(3)), with an allegation that defendant personally inflicted great bodily injury (§ 12022.8); in counts 10 and 11, with forcible oral copulation (§ 288a, subd. (c)), with allegations that defendant kidnapped the victim, personally inflicted great bodily injury on the victim, and engaged in the tying or binding of the victim, within the meaning of sections 667.61 and 12022.8; in counts 12 and 13, with aggravated sexual assault (oral copulation) of a child (§ 269, subd. (a)(4)), with allegations that defendant personally inflicted great bodily injury (§ 12022.8); in count 14, with kidnapping to commit sodomy (§ 209, subd. (b)(1)), with

an allegation that defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)); in count 15 with kidnapping to commit oral copulation (§ 209, subd. (b)(1)), with an allegation that defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)); in count 16 with kidnapping of a person under the age of 14 years (§ 208, subd. (b)), with an allegation that defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)); and in counts 17, 18, 19, 20 and 21, with perpetrating a forcible lewd act upon a child (§ 288, subd. (b)), with allegations that defendant kidnapped the victim, personally inflicted great bodily injury on the victim, and engaged in the tying or binding of the victim, within the meaning of sections 667.61 and 12022.8.

Defendant stipulated to a court trial. After the court viewed the videotape of the victim's interview with the police, defendant testified on his own behalf. Defendant is six feet, four inches tall. Defendant admitted possessing child pornography. Defendant testified that the victim was in the house for a period of one and one-half to two hours. Defendant maintained that he had "no idea of what [he] was doing" during the assault. On October 4, 2000, the court found defendant guilty on all counts but 5 and 9. As to each of the guilty counts, the court found the special allegations true.

The trial court sentenced defendant to an indeterminate term of 240 years to life in prison, plus a determinate term of seven years, as follows:

Count 1	Assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)): The upper term of four years plus a consecutive term of three years for the great bodily injury enhancement (§ 12022.7).
Counts 2, 3, 4	Sodomy by force (§ 286, subd. (c)): Three consecutive terms of 25 years to life, plus consecutive five-year terms for the great bodily injury enhancement assessed with each count (§ 12022.8).
Counts 10, 11	Forcible oral copulation (§ 288a, subd. (c)): Two consecutive terms of 25 years to life, plus consecutive five-year terms for the great bodily injury enhancement assessed with each count (§ 12022.8).
Counts 17, 18, 19	Forced lewd act upon a child under 14 (§ 288, subd. (b)): Three consecutive terms of 25 years to life, plus consecutive five-year terms for the great bodily injury enhancement assessed with each count (§ 12022.8).

As to the remaining convictions, the court imposed but stayed sentence as follows:

Counts 6, 7, 8	Aggravated sexual assault (sodomy) of a child under 14 (§ 269, subd. (a)(3)): Three consecutive terms of 15 years to life, plus consecutive 5-year terms for the great bodily injury enhancement assessed with each count (§ 12022.8): STAYED.
Count 12, 13	Aggravated sexual assault (oral copulation) of a child under 14 (§ 269, subd. (a)(4)): Two consecutive terms of 15 years to life, plus consecutive 5-year terms for the great bodily injury enhancement assessed with each count (§ 12022.8): STAYED.
Count 14	Kidnapping to commit sodomy (§ 209, subd. (b)(1)): A consecutive term of life in prison with possibility of parole plus a consecutive term of three years for the great bodily injury enhancement (§ 12022.7): STAYED.
Count 15	Kidnapping to commit oral copulation (§ 209, subd. (b)(1)): A consecutive term of life in prison with possibility of parole plus a consecutive term of three years for the great bodily injury enhancement (§ 12022.7): STAYED.
Count 16	Kidnapping of a child under 14 (§ 208, subd. (b)): The midterm of eight years plus a consecutive term of three years for the great bodily injury enhancement (§ 12022.7): STAYED.
Counts 20, 21	Forcible lewd act upon a child under 14 (§ 288, subd. (b)): Two consecutive terms of 25 years to life, plus consecutive 5-year terms for the great bodily injury enhancement assessed with each count (§ 12022.8): STAYED.

This appeal followed.

DISCUSSION

I. THE MEANING OF "SINGLE OCCASION" UNDER SECTION 667.61

It is undisputed by the parties that many of defendant's offenses qualified him for sentencing under section 667.61, also known as the one strike law. Applying that section, the trial court sentenced defendant to serve eight fully consecutive prison terms of 25 years to life plus 5 years, based upon the court's interpretation of section 667.61, subdivision (g). Subdivision (g) prohibits consecutive sentences for multiple sexual assaults, when they occur on a single occasion: "The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against

a single victim during a *single occasion*." (Italics added.) The trial court held that when, in the course of committing multiple sexual assaults, an offender had a reasonable opportunity to contemplate his or her conduct, yet nevertheless resumed the sexually assaultive behavior, the single occasion rule did not apply and consecutive sentences could be imposed.

Subsequent to the trial court's decision, our Supreme Court interpreted subdivision (g) of section 667.61 in a case with facts similar to our own. (*People v. Jones*, *supra*, 25 Cal.4th at pp. 103-107.) In *Jones*, the defendant grabbed the victim and forced her by the neck into a garage and then into the backseat of a car, where he engaged in a series of sexual assaults. The trial court imposed three consecutive prison terms of 25 years to life for three sexual assault convictions. (*Id.* at pp. 101-103.) The Supreme Court reversed, rejecting the appellate court's conclusion that the words "single occasion" should be interpreted in light of the definition of the phrase "separate occasions" found in another sex offense sentencing provision—section 667.6, subdivision (d). (*People v. Jones*, *supra*, at pp. 104-105.) Section 667.6, subdivision (d) mandates full, separate and consecutive sentences for certain sex offenses that "involve the same victim on separate occasions." (*People v. Jones*, *supra,* at p. 104.) In addition, the provision directs how the separate occasions requirement should be applied: "In determining whether crimes against a single victim were committed on separate occasions . . . , the court shall consider whether, between the commission of one sex crime and another, the defendant had a *reasonable opportunity to reflect* upon his or her actions and nevertheless resumed sexually assaultive behavior." (§ 667.6, subd. (d), italics added.)

The Supreme Court concluded that the phrases separate occasions and single occasion, as used in the respective sections, are similar but not identical. (*People v. Jones*, *supra*, 25 Cal.4th at p. 105.) The court found no basis in the drafting of section 667.61, nor evidence of legislative intent to warrant utilizing the definition of "separate occasions" within section 667.6 when interpreting the meaning of "single occasion" within section 667.61. (*People v. Jones, supra*, at pp. 105-106.) Furthermore, the court reasoned that "given the harshness of the punishment dictated by [] section 667.61,

subdivision (g)—of life imprisonment—and the lack of definitive legislative direction, the rule of lenity also points to the conclusion that the Legislature intended to impose no more than one such sentence per victim per episode of sexually assaultive behavior." (*Id.* at p. 107.)

The court held that, under section 667.61, subdivision (g), sex offenses will have occurred "on a 'single occasion' if they were committed in close temporal and spatial proximity." (*People v. Jones, supra*, 25 Cal.4th at p. 107.) Accordingly, the court concluded that the defendant in *Jones* should have received a *single* life sentence, rather than *three* consecutive life sentences, for the sequence of sexual assaults against one victim that occurred "during an uninterrupted time frame and in a single location." (*Ibid.*)

In the instant case, the parties agree that the trial court did not apply the temporal and spatial proximity standard mandated by *Jones*, thereby necessitating that the matter be remanded for resentencing. The parties disagree, however, whether on remand the facts in this case could support a determination by the trial court under *Jones* that defendant engaged in sex offenses on more than a single occasion. The People argue that the facts in the present case are distinguishable from *Jones* because here the evidence showed that defendant moved the victim from the kitchen area to the upstairs bedroom, interrupted his assaults to retrieve a knife from the kitchen used to cut off the victim's shirt, and interrupted the series of sex offenses to accompany the victim to the bathroom.

Having reviewed the record, we see no reasonable basis under the present facts to find that the pertinent offenses occurred on more than a single occasion for the purposes of section 667.61. Once defendant completed his first act of sodomy on the victim, all of the subsequent sex offenses were committed in close temporal and spatial proximity. Thereafter, the only potentially significant interruption in the sex offenses occurred when the victim was permitted to use the bathroom between acts of sodomy. The precise duration of this bathroom visit is unspecified in the record, however defendant accompanied the victim to the bathroom and maintained close watch over him while there; defendant never even allowed the victim to close the bathroom door. Once the

victim had finished pretending to use the toilet, he was taken back to the same bedroom location where all the previous sexual assaults were committed, whereupon defendant resumed his acts of sodomy. The visit to the bathroom must have taken a period of minutes and involved moving the victim some distance away from the immediate area of the sexual assaults; however the interruption in sexual conduct was relatively brief and no separate sexual offenses were committed during this interval or at any second location within the house. Based upon the close temporal proximity between the sex offenses and the fact that all of them were committed in a single location, we conclude that they all occurred on a single occasion for purposes of section 667.61, and remand the matter for resentencing.

On remand, if the trial court exercises its discretion to resentence defendant pursuant to section 667.61, the trial court may only impose a single life sentence under that section for the sequence of sexual assaults by defendant in this case. However, the court has discretion on remand to sentence defendant pursuant to the consecutive sentencing provisions of section 667.6, subdivisions (c) or (d). If the court decides to resentence defendant under section 667.6, subdivision (d), it must give a factual explanation supporting its findings of separate occasions for each count sentenced under that subdivision. If the court decides to sentence pursuant to section 667.6, subdivision (c), and impose full, separate and consecutive terms for the sex offense counts that it determines did not occur on a separate occasions, the court must also provide a statement of reasons for this sentencing choice. (*People v. Irvin* (1996) 43 Cal.App.4th 1063, 1072.) The court further retains discretion to elect to sentence defendant on any count under the principal/subordinate method of section 1170.1. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348.)

II. NECESSARILY INCLUDED OFFENSES

Next, defendant contends that certain of his convictions must be reversed because they are necessarily included within other convictions. Defendant was convicted of three counts of forcible sodomy, in violation of section 286 (counts 2, 3 & 4), two counts of forcible oral copulation, in violation of section 288a (counts 10 & 11), and five counts of

aggravated sexual assault of a child, in violation of section 269 (counts 6, 7, 8, 12 & 13). Defendant argues that the five counts charging sodomy and oral copulation are necessarily included within the aggravated sexual assault offenses. We agree.

These 10 counts represent alternative charges of only five different acts, which presents the question: When may a defendant suffer multiple convictions for offenses arising out of a single act?[2] Section 954 permits a prosecutor to file an accusatory pleading which charges "different statements of the same offense," and further provides that "the defendant may be convicted of any number of the offenses charged." Despite the broadly permissive nature of this language, our Supreme Court "has long held that multiple convictions may *not* be based on necessarily included offenses." (*People v. Pearson* (1986) 42 Cal.3d 351, 355, italics in original.) When an offense cannot be committed without necessarily committing another, the second is a necessarily included offense. (*People v. Greer* (1947) 30 Cal.2d 589, 596.) Under *Greer*, a court compares the elements of the relevant offenses. When proof of the first offense necessarily establishes the elements of the second, the second is necessarily included within the first. Under this "elements" test, neither sodomy nor oral copulation are necessarily included within the offense of aggravated sexual assault. Aggravated sexual assault forbids the commission of certain types of sexual offenses against a child under 14 years of age, and 10 or more years younger than the accused. While sodomy and oral copulation are among the assaults listed, a person may violate section 269 without committing either act.

The definition of a necessarily included offense has been expanded beyond the elements test, however, to include the "adjudicatory pleading" test: "Where a defendant is charged with one or more offenses and from the language of the pleading the commission of one charged offense necessarily includes the commission of another, the latter is a 'necessary included offense,' even though its elements are not within the legal elements of the greater offense as defined by statute. [Citations.]" (*People v. Nicholson*

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[2] As the trial court recognized, section 654 prohibits multiple *punishments* for these multiple convictions.

(1979) 98 Cal.App.3d 617, 623; see also *People v. Marshall* (1957) 48 Cal.2d 394, 405.) The information in this matter charged the section 269 violations in counts 6, 7 and 8 as aggravated sexual assault (sodomy) of a child. The section 269 violations in counts 12 and 13 were charged as aggravated sexual assault (oral copulation) of a child. Under the accusatory pleading test, as the People concede, counts 2, 3, 4, 10 and 11, charging three counts of sodomy and two counts of oral copulation, respectively, are necessarily included within the aggravated sexual assault charges.

Relying on *People v. Scheidt* (1991) 231 Cal.App.3d 162, the People argue that the accusatory pleading test should not be applied when determining whether multiple convictions may stand. In *Scheidt*, the court recognized the two different tests to determine whether an offense is necessarily included, but pointed out that this question arises in more than one context. Simply because both tests are justified in one context does not imply that both should apply in all. (*Id.* at p. 166.)

The need to define a necessarily included offense arises when a court determines whether it may instruct a jury on an uncharged offense. (*People v. Barrick* (1982) 33 Cal.3d 115, 133-135.)[3] Due process considerations of notice to the accused normally prohibit a conviction for an uncharged offense. (*People v. West* (1970) 3 Cal.3d 595, 612.) However, when all of the elements of the uncharged offense must be proved in order to establish a charged offense, the defendant is effectively given notice that he must defend against each. Inasmuch as the uncharged offense is necessarily included within the charged, due process is not offended by the instruction. Since the language of the accusatory pleading may provide that same notice, it is appropriate to expand the

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3 A trial court must instruct on an uncharged, necessarily included offense " 'when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.' " (*People v. Barton* (1995) 12 Cal.4th 186, 194-195, fn. omitted, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 715.) If the indictment in a case identical to the instant case had simply charged the defendant with the aggravated sexual assault violations alone, and each charge had specified either sodomy or oral copulation, the court might have been required to instruct on the necessarily included offenses of sodomy and oral copulation.

definition of necessarily included offenses accordingly. (*People v. Marshall, supra,* 48 Cal.2d at pp. 405-406.)

Scheidt and the instant case present the question in a different context: When may a defendant who faces multiple charges for a single act suffer multiple convictions from that act? *Scheidt* concluded that, since notice is not the issue in multiple conviction cases, applying the accusatory pleading test in that separate context was unjustified. (*People v. Scheidt, supra,* 231 Cal.App.3d at p. 168.)

We have some concern regarding the *Scheidt* decision. It is certainly correct that the reason for the prohibition against multiple convictions is different from the concern for notice, which prompted the prohibition against convicting one for an uncharged offense. However, this difference, alone, should not be determinative. By maintaining the same definition of necessarily included offense in the instructions and multiple conviction contexts, we achieve a symmetry of result otherwise lost. Had the information in a case identical to this case charged defendant solely with aggravated sexual assault (sodomy), the judge might have been required to instruct the jury on sodomy as well, because it is necessarily included under the accusatory pleading test. However, the jury would only have been permitted to convict the defendant of one of these offenses, because they would also have been instructed to decide the included offense only if unable to convict of the crime charged.[4] No good reason has been suggested to permit a different result simply because the accusatory pleading charged both sodomy and aggravated sexual assault (sodomy) of a child. It would seem that the prosecution, in either context, should be able to obtain a conviction on the included offense, whether or not it is specifically alleged in the indictment, but not if the defendant has also been convicted of the greater charge.

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4 CALJIC No. 17.10 provi des, in pertinent part: *"If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged*, you may nevertheless convict [him] [her] of any lesser crime, if you are conviced beyond a reasonable doubt that the defendant is guilty of the lesser crime." (Italics added; see *People v. Dennis* (1998) 17 Cal.4th 468, 535-536.)

We note that, subsequent to *Scheidt*, our Supreme Court has, on more than one occasion, included both the elements test and accusatory pleading test in its definition of necessarily included offense in the multiple convictions context. (See *People v. Sanchez* (2001) 24 Cal.4th 983, 988; *People v. Ortega* (1998) 19 Cal.4th 686, 698.) The People correctly point out that the accusatory pleading test was not determinative in either of these two cases and urges us to disregard the language in both. Though, strictly speaking, we are not bound by the holdings in *Sanchez* and *Ortega*, we believe they support our conclusion that applying both tests in both contexts is the wiser course.[5]

In any event, *Scheidt* is distinguishable. In that case the defendant was convicted of possession of a sawed-off shotgun and possession of a firearm by an ex-felon. In a passage critical to its holding, the court noted that each of these crimes advances a different legislative interest, which would be frustrated if the accusatory pleadings test prohibited conviction of both. (*People v. Scheidt*, *supra,* 231 Cal.App. 3d at pp 170-171.) In our case, however, this does not appear to be true. Section 269 protects children against several different sexual violations. Sections 286 and 288a protect children (and adults) against certain of those same sexual violations. No apparent legislative interest is frustrated by limiting the People to one conviction for the most serious crime charged per assault.

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[5] The People point out that the included offenses carry a harsher penalty than the aggravated sexual assault charges, when the enhancing allegations are considered, and request "that this Court remand the case to allow the prosecutor to elect whether to reverse [*sic*] the greater or the lesser included offenses." The People recognize that the more common approach is to reverse an included offense, not the greater offense. (*People v. Pearson, supra,* 42 Cal.3d at p. 355.) They cite no case directly on point in support of their request and it would seem to violate the logic of the rule prohibiting conviction of both a greater and a necessarily included offense: "If a defendant cannot commit the greater offense without committing the lesser, conviction of the greater is *also* conviction of the lesser. To permit conviction of both the greater and the lesser offense ' " 'would be to convict twice of the lesser.' " ' [Citation.] There is no reason to permit two convictions for the lesser offense." (*People v. Ortega, supra,* 19 Cal.4th at p. 705 (conc. & dis. opn. of Chin, J.), italics in original.) We reject the request.

III. CONVICTION OF MULTIPLE KIDNAPPING-RELATED OFFENSES

In a related argument, defendant contends he was improperly convicted of multiple kidnapping-related offenses when the facts established that there was only one continuous detention of the victim. Defendant was convicted in count 14 of kidnapping to commit sodomy (§ 209, subd. (b)(1)), in count 15 of kidnapping to commit oral copulation (§ 209, subd. (b)(1)), and in count 16 of kidnapping a person under the age of 14 years (§ 208, subd. (b)).[6] The trial court imposed but then stayed sentences on each of these counts pursuant to section 654.

As we noted above, "defendants may be charged with and convicted of multiple offenses based on a single act or indivisible course of conduct." (*People v. Pearson, supra*, 42 Cal.3d at p. 354, citing § 954.) Where the charges arising from a single act or an indivisible course of conduct involve different offenses entailing different elements of proof, a defendant may be properly convicted of both. (*People v. Rocha* (1978) 80 Cal.App.3d 972, 975.) On the other hand, "multiple convictions may *not* be based on necessarily included offenses." (*People v. Pearson*, *supra*, at p. 355, italics in original.)

Here, each of these kidnapping-related offenses involved different elements of proof. Kidnapping to commit sodomy requires that the accused acted with the specific intent to commit sodomy when the kidnapping commenced. Kidnapping to commit oral copulation requires that the accused acted with the specific intent to commit oral copulation when the kidnapping commenced. (§ 209, subd. (b)(1); see also *People v. Bryant* (1992) 10 Cal.App.4th 1584, 1595-1596; see also CALJIC No. 9.54.) Kidnapping of a person under the age of 14 years requires that a child under 14 years of age was unlawfully moved. (§§ 207, 208, subd. (b); see also CALJIC No. 9.52.) Because each of these offenses required proof of an element different from the others, none is a necessarily included offense of the others and each could give rise to a separate conviction of defendant arising from one continuous course of conduct.

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6 In his reply brief, defendant has conceded that kidnapping a person under the age of 14 years (§ 208, subd. (b)) is not a lesser included offense of kidnapping to commit sodomy.

The case of *People v. Thomas* (1994) 26 Cal.App.4th 1328, relied upon by defendant, is distinguishable on its facts. There, the defendant was convicted of two counts of abducting the victim to rob her of different items of her personal property. The defendant pointed a gun at the victim and forced her into her car. He took her wallet with credit cards and $35 in it. The defendant also said that he wanted her automatic teller machine (ATM) card, but she told him it was at her apartment. Defendant drove the victim toward her apartment but stopped along the way, where he committed multiple sex offenses against her. Afterwards he completed the drive to her apartment and told her get her ATM card while he waited outside. The victim went inside and called the police. The defendant fled before the police arrived. (*Id.* at pp. 1331-1332.) The appellate court reversed one of the kidnapping for robbery convictions on the ground that one continuous asportation of the victim could not be divided into two separate kidnapping for robbery offenses. (*Id.* at pp. 1334-1335.) The appellate court reasoned that there had been a single abduction, followed by a continuous period of detention. The fact that the defendant may have changed his approach or focus as to the robbery, or engaged in other crimes after the abduction, did not transform the offense into two separate kidnappings. (*Id.* at p. 1335.)

Thomas is distinguishable because the defendant in *Thomas*, unlike our case, was not convicted of different types of kidnapping-related offenses, having different elements, all arising from one continuous course of conduct. Where, as here, defendant's actions satisfied the elements of three different kinds of kidnapping-related offenses, he could properly be convicted of all three offenses. Furthermore, because the trial court stayed the sentences on the kidnapping offenses under section 654, this is not a situation where defendant has been subjected to double punishment. (*People v. Rocha*, *supra*, 80 Cal.App.3d at p. 975.)

DISPOSITION

As to the three counts of forcible sodomy (counts 2, 3 & 4), and the two counts of forcible oral copulation (counts 10 & 11), the judgment of convictions is reversed. As to

the remaining counts, the matter is remanded for resentencing of defendant consistent with this opinion.

SIMONS, J.

We concur.

JONES, P.J.

STEVENS, J.